LEN MIN KONG

v.

UNITED MALAYAN BANKING CORP BHD & ANOR APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-84-95]
17 NOVEMBER 1997

BANKING: *Securities for advances - Joint guarantee - Liability of guarantors where guarantee not executed by co-surety - Whether guarantee void and unenforceable - Section 97 Contracts Act 1950 - Applicability*

CONTRACT: *Guarantee - Joint guarantee - Liability of guarantors where guarantee not executed by a co-surety - Whether guarantee void and unenforceable - Whether guarantee executed upon a contract that creditor shall not act upon it until another joins as co-surety - Section 97 Contracts Act 1950 - Applicability*

CIVIL PROCEDURE: *Appeal - Rehearing - Fundamental misdirection by court of first instance - Improper inferences - Duty of appellate court - Whether to interfere with findings of fact thereof - Courts of Judicature Act 1964, s. 69(4)*

EVIDENCE: *Conflicting evidence - Oral evidence - Judicial reception of - Oral evidence inconsistent with contemporaneous evidence - Duty of trial judge - Whether to critically test evidence against the whole of the other evidence and the circumstances of the case*

The respondent had granted a loan to a company known as Cornwood Industries Sdn Bhd ('the company') subject to a condition that it would be guaranteed by all the directors of the company. In consequence, the appellants, being directors of the company, executed certain guarantees in respect of the loan so granted. Following a recovery action by the respondent against the guarantors, the appellants claimed that they were not liable to the respondent under the guarantees, as one Soh Chin Seong ('Soh'), a director of the company, had not also executed like guarantees in favour of the respondent. It was the appellants' contention that, by reason thereof, and by virtue of s. 97 of the Contracts Act 1950, the guarantees that they had executed were void and not enforceable in law.

Before the trial judge, evidence was *inter alia* given by the managing director of the company ('the second defendant'), in respect of the position of Soh, that "I can't remember if Soh was no longer taking active part in first defendant. I can't remember if that is reason he did not sign guarantees. He was coming in and out in 1974, 1975, 1976 and 1977". The trial judge took this part of the evidence as demonstrating that during the years so mentioned, Soh was being appointed and removed as a director of the company, and that being so, ruled that Soh was not a director of the company at the material time and gave judgment against the appellants. The appellants appealed and argued that the trial judge, in concluding that Soh was not a director of the company, had misread the second defendant's evidence, and hence, had misdirected himself in law. The following primary questions, in the circumstances, arose for the determination of the appellate court, namely: (i) whether Soh was a director of the company at the material time; and if so (ii) whether Soh's omission to execute the guarantees in the respondent's favour had the effect of invalidating the guarantees, such as to relieve the appellants of any liability thereunder.

Held:
Per Gopal Sri Ram JCA

[1] The learned judge did not sufficiently evaluate the evidence, did not subject it to the scrutiny it deserved and did not draw the inferences it properly admitted. There are passages in the relevant evidence of the second defendant that amply confirm that he was not at all referring to Soh's entry and exit from the company's board, but rather to his less frequent participation in the affairs of the company. The learned judge hence misunderstood the second defendant's evidence when he concluded that that evidence demonstrated that Soh was being appointed and removed as a director of the company during the years in question.

[1a] Documentary evidence, as shown by the company's return dated 5 September 1975 and the bundle of documents herein, also confirm that Soh was a director of the company at the material time. Clearly, if there had been an adequate judicial appreciation of the evidence, both oral and documentary, the trial judge would have held that Soh was a director of the company at the material time. In the circumstances, this court has a duty to intervene and set right what went wrong in the court below. We therefore hold, by way of inference, that Soh was a director of the company when the respondent called for the execution of the guarantees.

[2] The phrase 'upon a contract' in s. 97 does not confine the parties to the contract of guarantee itself, but includes an arrangement between them, collateral to the main contract, whereby it is contemplated that more than one person should execute the guarantee. That being so, a guarantor who invokes the benefit of the section is not confined to the four corners of the contract of guarantee when seeking to establish the existence of the contract of which the section speaks. He is at liberty to adduce evidence *aliunde* to demonstrate that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor. The principle that applies here is no different from that obtaining in relation to collateral contracts generally at common law.

[2a] Whether an arrangement as contemplated by s. 97 exists is a question of fact or inference, depending upon the nature or quality of the evidence.

[3] Where the determination is a matter of inference it is the duty of an appellate court to examine the material on record to see if the trial judge has adopted the correct approach and has drawn the inferences properly admitted by evidence. And if the appellate court should find the trial judge has fallen into error in drawing the proper inferences, it is entitled to draw its own inferences from the proved or admitted facts and reverse the trial judge's conclusions.

[4] The present instance is not a case where the issue under consideration is one that turns upon credibility of oral testimony. It is truly a case where the issue that calls for resolution depends upon drawing the proper inferences from the totality of the evidence.

[5] The only reasonable and probable inference that is admitted by the evidence when taken as a whole, including the respondent's letter to the company dated 12 January 1977, is that there was a contract between the parties that Soh shall join in the guarantees. Since he did not do so, the guarantees in the present case are, according to the terms of s. 97, invalid. The judge should have so found. He erred in not so finding.

[Appeal allowed; orders and judgment of High Court set aside.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden telah memberi satu pinjaman kepada sebuah syarikat yang dikenali sebagai Cornwood Industries Sdn Bhd ('syarikat') dengan syarat bahawa kesemua pengarah syarikat hendaklah menggerenti pinjaman tersebut. Berikutan itu, gerenti-gerenti tertentu berkaitan dengan pemberian pinjaman tersebut telah dimeterai oleh perayu-perayu ('perayu'), yang merupakan pengarah syarikat. Ekoran tuntutan yang dibuat oleh responden terhadap penggerenti-penggerenti, perayu berhujah bahawa mereka tidak bertanggungan kepada responden di bawah gerenti berkenaan, oleh kerana gerenti yang serupa gagal ditandatangani oleh seorang lagi pengarah syarikat yang bernama Soh Chin Seong ('Soh'). Adalah menjadi hujah perayu bahawa, mengambil kira kegagalan Soh ini, dan s. 97 Akta Keterangan 1950, gerenti yang mereka meterai adalah tak sah dan dengan itu tidak boleh dikuatkuasakan.

Dihadapan hakim perbicaraan, keterangan antara lain telah diberi oleh pengarah urusan syarikat ('defendan kedua'), berhubung dengan kedudukan Soh, bahawa "Saya tidak ingat samada Soh tidak lagi mengambil bahagian aktif dalam defendan pertama. Saya tidak ingat samada itulah yang menyebabkan beliau tidak memeterai gerenti. Beliau datang dan pergi dalam tahun-tahun 1974, 1975, 1976 dan 1977". Hakim perbicaraan telah mentakrif keterangan ini sebagai menunjukkan bahawa dalam tahun-tahun yang berkenaan, Soh telah dilantik dan dibuang sebagai pengarah syarikat, dan dengan itu memutuskan bahawa Soh bukanlah pengarah syarikat pada waktu yang material, yang berakibat penghakiman diberikan kepada responden. Perayu merayu dan berhujah bahawa hakim perbicaraan telah tersilap tafsir keterangan defendan kedua bilamana memutuskan bahawa Soh bukan pengarah syarikat, dan dengan itu telah melakukan salah arahan di sisi undang-undang. Persoalan-persoalan penting berikut, dengan itu, telah berbangkit untuk keputusan mahkamah rayuan, iaitu: (i) samada Soh adalah pengarah syarikat pada waktu material, dan jika demikian (ii) samada kegagalannya untuk memeterai gerenti untuk manafaat responden telah menyebabkan gerenti tersebut menjadi terbatal, sehingga melepaskan perayu dari apa jua tanggungan di bawah gerenti berkenaan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Hakim yang arif gagal menilai keterangan dengan secukupnya, gagal memberikan penelitian yang sepatutnya kepada keterangan tersebut dan gagal menyimpulkan inferens yang diwajarkan oleh keterangan-keterangan berkenaan. Terdapat bahagian dalam keterangan defendan kedua yang mengesahkan dengan jelas bahwa beliau tidak langsung

merujuk kepada keluar masuk Soh dalam lembaga pengarah syarikat, tetapi sebaliknya merujuk kepada kekurangan penglibatan Soh dalam hal-ehwal syarikat. Hakim yang arif dengan itu telah tersalah faham keterangan defendan kedua bilamana merumuskan bahawa keterangannya itu menunjukkan bahawa Soh telah dilantik dan dikeluarkan sebagai pengarah syarikat dalam tahun-tahun yang berkenaan.

[1a] Keterangan dokumentar, seperti yang terlihat dari penyata syarikat bertarikh 5 September 1975 dan ikatan dokumen di sini, juga mengesahkan bahawa Soh adalah pengarah syarikat pada waktu material. Jelaslah, sekiranya terdapat penilaian kehakiman yang mencukupi terhadap kedua-dua keterangan lisan dan dokumentar, hakim perbicaraan tentunya akan memutuskan bahawa Soh adalah seorang pengarah syarikat pada waktu material. Oleh hal yang demikian, mahkamah ini bertanggungjawab untuk campurtangan dan membetulkan kesalahan yang berlaku di mahkamah di bawah. Kami dengan itu memutuskan, melalui inferens, bahawa Soh adalah seorang pengarah syarikat sewaktu responden bertindak melaksanakan gerenti yang berkaitan.

[2] Ungkapan 'upon a contract' dalam s. 97 tidak membataskan pihak-pihak hanya kepada kontrak gerenti berkenaan semata-mata, malah ianya termasuk juga apa-apa persetujuan yang dibuat di antara mereka, yang collateral kepada perjanjian utama, di mana terdapat jangkaan bahawa lebih dari seorang sepatutnya memeterai gerenti. Oleh hal yang demikian, seorang penggerenti yang membangkitkan faedah seksyen ini tidaklah terbatas hanya kepada keempat-empat penjuru kontrak gerenti itu sahaja. Beliau sebaliknya berhak untuk mengemukakan keterangan aliunde bagi menunjukkan bahawa terdapat juga satu persetujuan lain di antara mereka yang menyebabkan tanggungannya di bawah gerenti tersebut adalah tertakluk kepada pemeteraian gerenti itu oleh seorang penggerenti lain. Prinsip yang terpakai di sini tidak berbeza dengan yang terpakai kepada kontrak collateral secara amnya dalam common law.

[2a] Samada sesuatu persetujuan seperti yang dimaksudkan oleh s. 97 wujud atau pun tidak adalah satu persoalan fakta, dan bergantung kepada sifat and mutu keterangan.

[3] Di mana pemutusan adalah suatu perkara inferens, ianya menjadi tanggungjawab mahkamah rayuan untuk meneliti material di atas rekod bagi menentukan samada hakim perbicaraan telah menggunakan pendekatan yang teratur dan telah menyimpulkan inferens yang diwajarkan oleh keterangan. Dan sekiranya mahkamah rayuan mendapati bahawa hakim perbicaraan telah membuat kesilapan dalam ertikata tidak

membuat inferens yang wajar, ia berhak untuk menyimpul inferensnya sendiri dari keterangan yang sudah terbukti atau diterima, dan menterbalikkan konklusi hakim perbicaraan.

[4] Perkara di sini bukanlah satu kes di mana isu yang dipertimbangkan merupakan sesuatu yang tertumpu kepada kredibiliti keterangan lisan. Ianya adalah satu kes di mana isu yang perlu diputuskan bergantung kepada penyimpulan inferens yang wajar dan teratur dari keseluruhan keterangan yang ada.

[5] Dari keseluruhan keterangan, termasuk dari surat responden kepada syarikat bertarikh 12 Januari 1977, inferens yang mungkin dan munasabah yang boleh diambil hanyalah, bahawa terdapat satu kontrak di antara pihak-pihak di sini bahawa Soh harus sama-sama memeterai gerenti. Oleh kerana beliau tidak berbuat demikian, gerenti-gerenti berkenaan, berdasarkan terma s. 97, adalah tak sah. Hakim sepatutnya mencapai keputusan ini. Beliau silap apabila tidak berbuat begitu.

[Rayuan dibenarkan; perintah dan penghakiman Mahkamah Tinggi diketepikan.]

Cases referred to:

Ayyanna v. Veerabhadram AIR [1926] Mad 62 ***(refd)***
Chia Bak Eng & Anor v. Ponggol Bus Service Co [1966] 1 MLJ 224 ***(foll)***
Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1989] 1 MLJ 35 ***(refd)***
Govinda Mudaliar & Sons v. Govindasamy [1966] 2 MLJ 5 ***(foll)***
Mok Deng Chee v. Yap See Hoi [1981] 1 CLJ 124 ***(refd)***
Sivalingam v. Periasamy [1996] 4 CLJ 545 ***(foll)***
Stramit Industries Ltd v. Reinhardt [1985] 1 Qd R 562 ***(foll)***
Tan Chong & Sons Motor Company (Sdn) Bhd v. Alan McKnight [1983] 1 CLJ 77 ***(refd)***
Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1980] 2 MLJ 16 ***(foll)***
The City Bank v. Reynolds & Ors [1888] 9 LR (NSW) 472 ***(foll)***
The Ocean Frost [1985] 1 Lloyd's Rep 1 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 97
Courts of Judicature Act 1964, s. 69(4)
Contract Act 1872 [Ind], s. 144

Other sources referred to:

Contracts and Law Relating to Tenders, Sanjiva Row, 9th edn, vol 3, p 2426
Indian Contract and Specific Relief Acts, Pollock & Mulla, 11th edn, vol 2, p 995

For the 2nd appellant - AR Anthony; M/s Anthony, Chew & Lim
For the 3rd appellant - Franklin Goonting; M/s Lim Soh & Goonting
For the respondent - DP Naban (Raja Eileen with him); M/s Lee Hishamuddin

[Appeal from High Court, Kuala Lumpur; Civil Suit No: C-331-1979]

Reported by Rusnah Abdul Aziz

JUDGMENT

Gopal Sri Ram JCA:

Three appeals were called before us on 9 September 1997. They are Civil Appeals Nos. 83, 84 and 85 of 1995. All of them arise out of the same decision of the High Court at Kuala Lumpur. Mr. Jagdish Chandra who appeared for the appellant in Civil Appeal 83/95 informed us that his client had passed away after the appeal had been filed. His retainer had come to an end and he had no instructions from the deceased's estate. We therefore adjourned his appeal. However, we proceeded to hear arguments in respect of the remaining appeals and reserved our decision. Our decision and the reasons therefore now follow.

For convenience, we will refer to the appellant in the adjourned appeal as the first appellant, the appellant in Civil Appeal No. 84/95 as the second appellant and the appellant in Civil Appeal No. 85/95 as the third appellant.

General Background

There is a company known as Cornwood Industries Sdn. Bhd. It was the first defendant in the court below. But it is not before us in these appeals. For convenience we will refer to it as "the company". It had twelve shareholders and seven directors. The appellants before us were two of such directors.

Apart from the company there were six defendants in the main action. Of these, the first, second and third appellants were the second, fourth and sixth defendants respectively. They were sued by the respondent as guarantors of a loan that had been advanced to the company. All the appellants resisted the action on two grounds. First that the guarantees to which they were parties were invalid because one Soh Chin Seong ("Soh") who, according to the appellants was a director of the company at the material time, did not also execute the guarantees. Soh, however, was not a defendant to the action. Second that the respondent had not proved the actual sum for which the appellants were allegedly answerable.

The trial judge found against the appellants on both grounds and entered judgment for the respondent. In respect of the first ground relied upon as a defence, the learned judge held that Soh had not been a director of the company at the material time. He therefore concluded that the failure of Soh to join in the guarantees executed by the appellants was irrelevant to the appellants' liability. As regards the second line of defence, the trial judge held that the respondent had sufficiently proved the sum due to it. The instant appeals are directed against these findings of the judge.

Before us it was argued that the second and third appellants ought to succeed on both issues raised by them. We find it convenient to deal with the facts, chronology and arguments as they pertain to each issue separately.

The First Issue: Are The Guarantees Valid?

The facts and chronology relevant to the first issue are as follows.

On 12 January 1977, the respondent wrote a letter to the company making an offer of fresh facilities. It was put in at the trial and marked as exh. D10. It reads as follows:

M/s Cornwood Industries Sdn. Bhd.,
169-C, Jalan Birch,
Kuala Lumpur

Dear Sirs,

Re: Application for credit facilities under your current account No. 1508

We are pleased to inform you that our Head Office has approved your application for credit facilities of:

Clean Overdraft	-	$30,000/- @ 8.5% p.a. with monthly rest
Trust Receipts	-	$30,000/-
Letters of Credit	-	$50,000/-
Packing Credit	-	$50,000/-

to expire on 3-1-78.

The above facilities are granted subject to the following conditions:

1) Against cancellation of all previously approved facilities.

2) To be guaranteed by all the directors of the company jointly and severally in their personal capacities.

Enclosed herewith is our Continuing Guarantee & Indemnity form for execution and return, failing which the facilities will be treated as pending.

3) Your current account must be conducted actively and satisfactorily and operated within the limit at all times.

4) Bills must be paid promptly when due.

5) Facilities are to be renewed annually subject to our periodical review and are repayable on demand by us at any time.

Kindly acknowledge and confirm your acceptance of the above arrangement by signing and returning the copy of this letter to us within fourteen (14) days hereof, failing which the arrangement will automatically lapse.

Yours faithfully
(Signed)
Yang Chee Hai
Manager

When this letter was written, there were other credit facilities that had been extended by the respondent to the company. None of these are however relevant to the litigation at hand.

The second and third appellants (among other directors of the company) executed the guarantees of which the respondent's foregoing letter speaks. But Soh did not sign them. In the court below, it was contended that Soh was a director of the company and that his failure to execute the guarantees rendered them void. The trial judge found as a fact, based upon the evidence of the first appellant, that it had not been proved that Soh was a director of the company at the material time. His finding on this point has been attacked before us. If, as found by the judge that Soh was not a director at the material time, the point must be resolved against the appellants. However, even if the judge was wrong in his finding as regards Soh's directorship of the company, that is not the end of the matter. For, there remains the question whether his failure to join his fellow directors in executing the guarantee has the effect contended by the appellants.

Was Soh A Director At The Material Time?

This issue is essentially one of fact. There is abundant documentary evidence in the record of appeal which confirms that Soh was a director of the company at the material time. The return lodged by the company dated 5 September 1976 (produced and marked as exh. D11 in the court below) shows Soh as a director. There is also a typewritten document put in and marked as exh. D9 that discloses Soh to be one of the directors of the company. Before us it is

common ground that exh. D9 was extracted from a bundle of documents, which the respondent had in its possession and which was made available to counsel for the second and third appellants in the course of the trial. It is therefore a fair inference that the respondent had in its possession at the relevant time information that went to show that Soh was a director of the company. Indeed, it may be safely concluded from the totality of the circumstances that were adduced before the learned judge that the respondent was possessed of such knowledge when it sent a specimen copy of the guarantee that was to be executed under cover of its letter dated 12 January 1977.

In the face of this unchallenged contemporaneous documentary evidence, the learned judge found Soh not to be a director at the material time based on a portion of the oral testimony given by the first appellant who was the managing director of the company. That evidence, given under cross-examination, is to be found at pp. 73-4 of the record in Civil Appeal 85/95 and reads as follows:

> I can't remember if Paul Soh was no longer taking active part in first defendant. I can't remember if that is reason he did not sign guarantees. He was coming in and out in 1974, 1975, 1976 and 1977.

The learned judge construed this evidence as demonstrating that Soh was being appointed and removed as a director of the company during the years mentioned by the witness. However, there are passages in the evidence of the same witness, preceding the passage relied on by the judge, that amply confirm that the witness was not at all referring to Soh's entry and exit from the company's board but to his less frequent participation in the affairs of the company. We are therefore not disposed to accept the interpretation placed by the learned judge upon the rather equivocal statement by the first appellant under cross-examination. Furthermore there was not at any point during the evidence of the first appellant, any suggestion made during cross-examination by counsel for the respondent that Soh was never a director of the company at the material time. That proposition of fact does not appear to have formed part of the respondent's case that was put to the appellants' witnesses.

We would also observe that the learned judge appears to have overlooked the testimony on the very point under discussion proffered by the respondent's witness Yang Chee Hai (PW3) – the Manager who signed the letter exh. D10 – under cross-examination by Mr. Jagdish Chandra. This is what he said:

> D10 – conditions have to be fulfilled and complied with. Before D10 we checked who Directors of first defendant were. D9 – this was the list available to me before D10 was sent out. We confirmed who shareholders were before D10 was sent out. Page 42 of A was in our possession before D10 was sent out. There were twelve shareholders and seven Directors. One of biggest shareholders is Soh Chin Seong. First condition in D10 presupposes previously approved facility. Second condition in D10 – 'all the Directors' means all seven Directors. 'Failing which' means failing the execution and return. We received P2 [the guarantee in question] back signed by six out of seven Directors. I can't remember if I ascertained who witness was. Witness was not servant, employee or officer of the plaintiff. After receiving P1, facility was disbursed – I can't remember how soon after. Plaintiff disbursed facility despite six out of seven Directors signing P1.

The approach that a trial court should take to circumstances as appear in the present instance has been discussed in many authorities and we think it appropriate to quote from two of them. The first is *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co* [1979] 2 MLJ 229, where Chang Min Tat FJ said (at p. 234):

> ... the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

The second is *Eastern & Oriental Hotel (1951) Sdn. Bhd. v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35, where the Supreme Court, after quoting with approval the following observation made in *"The Ocean Frost"* [1985] 1 Lloyd's Rep. 1:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

said:

> In commercial cases there is usually a substantial body of contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevancy of contemporaneous documents nevertheless holds true.

Applying the foregoing principles to the present case, we find that there is much force in the argument of Mr. Franklin Goonting of counsel for the third appellant, whose submissions were adopted in toto by Mr. Alex Anthony of counsel for the second appellant, that the learned judge did not sufficiently evaluate the evidence, subject it to the scrutiny it deserved and draw the inferences it properly admitted. We are also in agreement with the submission of Mr. Goonting that the learned judge misunderstood the evidence of the first appellant that we adverted to earlier in this judgment. Indeed, we are satisfied that if there had been an adequate judicial appreciation of the evidence, both oral and documentary, the trial judge would have held that Soh was a director of the company at the material time.

Having thus concluded, our duty lies plainly before us. It is to intervene and set right what went wrong in the court below. That we now do, and hold, by way of inference, that Soh was a director of the company when the respondent called for the execution of the guarantees. If authority is required for the basis of appellate intervention in a case such as the present it is to be found both in written and common law.

So far as former is concerned, we refer to s. 69(4) of the Courts of Judicature Act 1964, which reads:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

As for case law, there is a host of decisions on the point which provides a ready answer. The course we have thus far pursued and that we propose to pursue renders it necessary to refer to some of these to demonstrate consistency of appellate approach.

In *Chia Bak Eng & Anor v. Ponggol Bus Service Co.* [1966] 2 MLJ 224, the judge at first instance had rejected the evidence of a witness who alleged that he had been present at the scene of the collision and gave an account of it. The judge gave reasons for accepting the evidence of the respondent's bus driver and for dismissing the appellant's action. The former Federal Court allowed the appeal and ordered a re-trial. Chua J, with whose judgment the other members of the court concurred, said (at p. 225):

The learned judge appeared to have been so unduly influenced by the version of the accident given by the driver of the bus in the report that he could not bring himself to accept the evidence of Lim Ah Huat.

The appellants have satisfied me that this appeal should be allowed as, in my view, the learned trial judge erred in rejecting the evidence of Lim Ah Huat.

Now, the question arises as to what this court should do. Should this court reverse the conclusions of the learned judge and accept the evidence of Lim Ah Huat as true and draw inferences from the facts disclosed in his evidence?

The duty of a court hearing an appeal from the decision of a judge was clearly defined by Lord Halsbury in the House of Lords case of *Montgomerie & Co. Ltd. v. Wallace-James* [1904] AC 73, at p. 75:

> Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to the truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.

And in another House of Lords case of *Thomas v. Thomas* [1947] AC 484 Lord Thankerton said at p. 487:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case and, it may be, the individual case in question.

> In the present case there is the question of the credibility of the only witness called by the plaintiffs who said he was present when the accident took place and **it is not a case where the point in dispute is the proper inferences to be drawn from proved facts.** An appellate court in these circumstances is not in a good position to evaluate the evidence of Lim Ah Huat as it is difficult to estimate correctly the credibility of this witness from the printed evidence. In my opinion I should not in this case without the advantage of seeing the witness come to the conclusion that the witness was speaking the truth. (Emphasis added.)

Next, in *Govinda Mudaliar & Sons v. Govindasamy* [1966] 2 MLJ 5, Gill J, (as he then was) put the matter in this way:

> How a point of law may be involved in findings of fact was considered by Barakbah J (as he then was) in *Tay Yew Heng v. Lee Thean Lai* [1959] MLJ 78, 79 and by Thomson CJ (as he then was) in the Court of Appeal in the case of *Gurcharan Singh v. Rochi Silk Store* [1959] MLJ 229, 231. Their Lordships cited with approval the following passage from the speech of Lord Radcliffe in the House of Lords in the case of *Edwards v. Bairstow* [1956] AC 14, at p. 36:
>
> > When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.
>
> In the *Gurcharan Singh* case Thomson CJ said that 'if the appellant wished to make out that the board had erred in law he had to make out either that there was no evidence on which a tribunal directing itself correctly as to the law could have arrived at the conclusion at which it did arrive or that as a matter of inference the evidence on which the tribunal acted should not have led to that conclusion.

Lastly, there is the decision of this court in *Sivalingam v. Periasamy* [1995] 3 MLJ 395. It was there said (at p. 398):

So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And of the principles that should govern such a case as the present there is no doubt.

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safety say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* [1942] 73 Lloyd LR 217:

> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* in these mundane happenings there is no more conclusive argument than *non est credendum quia* impossible. *If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*
>
> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

In the same case, Lord Atkin, while recording a vigorous dissent, said (at p. 220):

> My Lords, this is an appeal from the Court of Appeal, who affirmed a decision of Langton J, holding that in a collision between the Eurymedon, belonging to the appellants, and the British Reliance, belonging to the respondents, the Eurymedon was alone to blame. The learned judge, of course, saw the witnesses, and had that initial advantage which, as I have said elsewhere, an appeal tribunal can never recapture. But judges have before this been mistaken in their acceptance of witnesses' stories; and if the appellate tribunal is satisfied that a mistake has been made, I apprehend that it is their duty to say so. An appellate court in this country proceeds to consider an appeal by way of rehearing: on the rehearing it is equally charged with the task of

> doing justice between the parties. The judge may have accepted the evidence of one party on a general survey of all the facts, weighing the probabilities, he may even accept evidence in spite of improbability from a conviction, after watching demeanour, that a particular witness has told the truth, and that a witness or witnesses to the contrary have not. In the latter case the burden of an appellant is heavy, but it is not insupportable. The appellate court has still to determine the issue between the parties and may feel constrained to hold that the judge's estimate of the witnesses is mistaken. It is, in my opinion, a mistake to suppose that the decision of this House in the *Hontestroom* [1927] AC 37, laid down as a proposition of law that an appellate tribunal must in all cases accept the findings of a trial judge where he purports to base these on his belief in the credibility of particular witnesses. No court can so restrict its statutory jurisdiction; and in these days, where civil cases involving important questions of credit and reputation and even of liberty are determined by a judge alone, it is of great importance that the full jurisdiction should be maintained.

Again, in *Onassis and Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Rep 403 at p. 430, Lord Pearce's dissenting speech contains the following valuable reminder:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. *It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions.* Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

Having thus determined that Soh was a director of the company at the material time, we turn to consider the next question. It is whether his omission to execute the guarantees in the respondent's favour has the effect contended for by the appellants before us.

Are The Guarantees Invalid?

At the forefront of Mr. Goonting's submission that the guarantees were invalid for the want of its execution by Soh lay his reliance upon s. 97 of the Contracts Act 1950. That section provides as follows:

97. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

The section is *ipsissima verba* s. 144 of the Indian Contract Act 1872. Sanjiva Row on *Contracts and Law Relating to Tenders*, 9th Edn, a leading treatise on the subject, in vol. 3 of the work, p. 2426, has the following commentary upon the equipollent Indian section:

> The section seems to be based on *Evans v. Bremridge* [1855] 44 ER 327 and *Bonsor v. Cox* [1841] 49 ER 385. A person who enters into an obligation of suretyship on the understanding and faith that another person would also enter into, has right to be relieved on the ground that the instrument has not been executed by the intended surety. In the above-noted case the creditor prepared a deed in such a way as to show that it was intended to contain a joint and several covenant by two co-sureties and sent it in that form to be executed by one of them and never afterwards informed him that it had not been executed by the other surety, but on the contrary wrote to him as 'one of the surety,' it was held in equity, the surety was entitled to be relieved of liability. For similar reason, a surety bond which after execution by three of the sureties is in a material respect altered by the fourth, when he executes it, is inoperative against all. It became inoperative against the three on account of alteration by the fourth, and against the fourth it was only a joint and several bond that he intended to execute. The rule of the section, however, will not apply to cases of joint and several obligation where the transaction is not really a guarantee, but a primary undertaking, though the word guarantee is used. A guarantee drawn up in plural number, but signed by one surety only, is binding on the surety who signed in the absence of proof that the person who signed the document was only to be bound in case his partner also joined.

In *Ayyanna v. Veerabhadram* AIR 1926 Mad. 62, 63, Jackson J, when dealing with an argument that the defendant in that case was relieved of liability because his co-surety had not executed the guarantee said:

> It is contended on behalf of the petitioner that in such cases there is a presumption that the person who signed the document did not intend to be responsible unless the others joined. In support of this argument, the remark of Brett, LJ, in *Exparte Harding, In re Smith, Fleming v. Co* [1879] 12 Ch. D is cited.
>
> > And, therefore, the doctrine that one of a number of sureties who signs a guarantee only agrees to be liable in case all others sign, has no application.

I have not been able to find this doctrine laid down, elsewhere, to the effect that there is a presumption that one of a number of sureties who signs a guarantee only agrees to be liable in case all the others sign. In *Cunningham and Shepherd's Commentary on the Indian Contract Act,* 11th Edn, p. 36, it is observed that:

> Apparently it may be presumed that a party who has executed a bond did not intend to be bound unless the other person mentioned executed it when the contract is in the nature of a guarantee.

The learned commentators refer for authorities to their note the actual section – S. 144. But there I only find it laid down as follows:

> It appears to be a question of fact whether a promisor who has executed bond which is in form joint is intended to be bound only if the other person named in it has also executed it;

and the English authorities to which my attention has been called by the respondent seem to bear out that there is no presumption. In *Coyte v. Elphick* 22 WR 541, 543, Blackburn, J, says:

> There is no authority for saying that because a deed contemplated several parties joining as co-sureties, therefore one of them does not bind himself if he signs unless the others also sign. There is no authority for such a contention.

A note in *Lord Halsbury's Laws of England,* vol. 15, p. 469, para. 901, is to the same effect:

> A guarantee drawn up in the plural number, and concluding as 'witness our hands' but signed by one surety only, is binding on the surety who signed it. *Norton v. Powell* [1842] 4 Man & G 42; where, however, one surety expressly or impliedly stipulates that the other surety shall also sign, this amounts to a condition precedent which must be fulfilled.

Therefore it is incumbent on the petitioner in this case to prove that, he did so stipulate. The learned Subordinate Judge is not quite correct in stating:

> There is no evidence which goes to show that at the time of the contract the third defendant expressly excluded his liability if his partner D. Basavalingam should not agree to sign therein.

What he means is that there is no evidence apart from the statement of the 3rd defendant as DW1, and evidently, he was not prepared to accept that statement without corroboration. I find therefore that there is neither presumption nor proof that the 3rd defendant was only to be bound in case his partner also joined. In these circumstances, there is no reason to revise the decree of the lower court.

Pollock and Mulla on the *Indian Contract and Specific Relief Acts*, 11th Edn, vol. 2, p. 995 contains the following commentary on s. 144 of the Indian statute:

> A surety who 'entered into the obligation upon the understanding and faith that another person would also enter into it ... has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety'. [*Evans v. Bremridge* [1855] 44 ER 327, per Turner, LJ]. Whether such a contract is to be inferred from the transaction as a whole is conceived (apart from the construction of any written document) to be purely a question of fact. The rule will not be extended to cases of joint and several obligation where the transaction is not really a guarantee, though that word may be used, but a primary undertaking.

We consider the facts of *The City Bank v. Reynolds & Ors.* [1888] 9 LR (NSW) 472 to be much akin to the present case. There, the defendants, directors of a company, applied to the plaintiff bank for an overdraft, to be secured by a guarantee to be signed by seven persons named in the application. The application was granted by a letter from the manager, "upon the joint and several guarantees of the parties named". Five of the guarantors, including the defendant Reynolds, signed the guarantee. The bank, at the express of four of the directors, not including Reynolds, advanced moneys without obtaining the other two signatures. Reynolds had signed the guarantee before any of the others and was not present when the request to advance was made. It was held that the defendant Reynolds was not liable because he must have signed the guarantee on the faith and understanding that no moneys would be advanced except on the terms mentioned in the manager's letter,

Darley CJ, (NSW) delivering the judgment of the court said (at p. 475):

> We think, therefore, the case falls within the authority of *Evans v. Bremridge* 2 K & J 174. In *Cumberledge v. Lawson* 1 CBNS 709, a case cited on behalf of the plaintiffs, it was held that a plea which set forth that one surety signed on the express condition that a co-surety would do so, and that this condition was not performed, would be a good plea. The case of *Coyte v. Elphick* 22 WR 541 was much relied upon by the plaintiff's counsel, but that case carries the matter no further than *Cumberledge v. Lawson* in deciding that when one of two intending sureties sign the instrument without any express condition that the other surety will sign, he is liable although the other does not sign. Here we think that express condition is to be found in the letter of the plaintiff's manager, when taken with the letter to which it was a reply. We are of opinion, therefore, that the defendant Reynolds signed this guarantee upon the faith and understanding that the contract contained in these two letters would be carried out, and this being so, he is not liable in this action.

In *Stramit Industries Ltd. v. Reinhardt* [1985] 1 Qd. R 562, the appellant, Stramit Industries Ltd., executed a guarantee in favour of the respondent, Reinhardt, guaranteeing payments by one Transpacific Construction Pty. Ltd. for goods and services supplied to it by the respondent. The appellant alleged that it was not liable on the guarantee on the ground that there was absent a guarantee in similar term from one Howard who, with the appellant was, at the relevant time, a director of Transpacific Construction Pty. Ltd. The District Court rejected the appellant's plea and found for the respondent. The appellant appealed to the Full Court of the Supreme Court of Queensland which allowed his appeal. Matthews J, (with whom Campbell CJ and Carter J concurred) said:

> I think it clear that if one accepts what the appellant said, and there seems to be no question of credibility raised, he was telling the court that it was his understanding that the guarantee would only be binding if the two directors, named in the application for credit, signed it. The document, he said, was to go to his fellow director's office after he completed it and he had no knowledge of what became of it thereafter. It was produced by the respondent but there was no explanation in the evidence how it came to be in the respondent's hands.
>
> There is a series of authorities dealing with the liability of a surety who believes that another surety would also sign. If one looks at these authorities, one sees that different propositions emerged over a period of time.
>
> In *Evans v. Bremridge 8 DeG.M. & G.* 100; 44 ER 327 a borrower of money was required by the lenders to procure two responsible persons to join him in covenants for repayment. The borrower requested that the plaintiff be one of the sureties saying that a Mr. Bradley (an uncle of the borrower), would be the other. The names of the plaintiff and Mr. Bradley as proposed sureties were given to the lender, who prepared an indenture in which the plaintiff and Mr. Bradley were so named. The plaintiff executed the indenture but, when subsequently, as a surety, he was called upon to pay the relevant debt, he discovered that Mr. Bradley had not in fact signed it. Knight Bruce LJ said that it was sought to charge the plaintiff 'with a contract, into which he did not enter' and Turner LJ said:
>
> > As the plaintiff entered into the obligation upon the understanding and faith that another person would also enter into it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety.
>
> Later, in *Coyte v. Elphick* [1874] 22 WR 541 at p. 544, Blackburn J seems to have introduced a further dimension. He said, and I quote:

> If I say as a matter of law, where there are more than one surety on the face of a deed one is not bound by his signature unless the others sign then the fact that Mrs. Rea not having signed would be a good defence. But that is not the law, and unless either the parties expressly stipulated that one surety should not be bound unless the others were or the defendant delivered the deed as an escrow, the fact that she did not sign is no defence.

The test of express condition was accepted in *The City Bank v. Reynolds & Ors.* [1889] WN (NSW) 64, but the court found an express condition in a letter accepting an application for an overdraft by which the application was granted 'upon the joint and several guarantees of the parties named. ...

The parties referred to were the persons who had been named as prospective guarantors in the application.

In *Hansard v. Lethbridge & Ors.* [1892] 8 TLR 346, the question was considered by the Court of Appeal. The head note reads 'where a surety executes a document in the belief derived from its form, that it will be executed by all the sureties named therein as persons who are to sign, he will be relieved from his obligation if all the others do not sign'. The head note is adopted from the reasons for judgment of Lord Esher: M.R. and after the particular passage His Lordship, went on:

> This document, on its face required all the sureties to sign. It was true that the document was not drawn by the plaintiff or his solicitor, but that did not alter the matter, though Judges in certain cases had treated that certain circumstance as strengthening the case. When this document was laid before the defendants, it appeared upon its face that all the directors were to sign. They had a right to insist upon all signing before becoming liable themselves.

Fry LJ who concurred said:

> The knowledge that all the sureties were to sign the document might be communicated to the obligee, either by words or by the form of the instrument itself. Here the form of the instrument showed that the intention was that all the directors should sign it and therefore knowledge of that in the obligee must be assumed.

Hansard v. Lethbridge & Ors. (supra) was regarded by Walton J in *The National Provincial Bank of England v. Brackenbury* [1906] 22 TLR 797 as 'the important authority on this subject'. His Lordship set out the passage of Lord Esher's judgment which I have already quoted after referring to the principle as having been accurately stated in Rowlatt on *Principal And Surety*. The particular passage now appears in the 4th Edn of that work and reads:

> On similar principles a surety is not bound if the instrument, when signed by him, is drawn in a form showing himself and another or others as intended joint and several guarantors and any intended surety does not sign. It is immaterial by whom the instrument was prepared or whether the surety omitted was solvent or not. In such cases the creditor must show that the surety consented to dispense with the execution of the document by the other or others.

As authority for the proposition contained in the final sentence of this passage, *Rowlatt* describes *Hansard v. Lethbridge & Ors (supra)* as settling the law.

The learned trial judge, dealing with the front portion of exhibit 1 [the guarantee] said that two propositions emerged from it. First, that the plaintiff (the respondent) did not make it a condition of granting credit, that all directors should give personal guarantees and also that, by it, the defendant (the appellant) did not offer or agree to give a personal guarantee, if credit was extended, only if his co-director also gave a guarantee. So far as the reverse side of exhibit 1 is concerned His Honour said that:

> On its face the guarantee was one solely given unconditionally by the defendant.

In rejecting a proposition that the parties envisaged only the situation where both directors would give guarantees, His Honour pointed to the absence of any relevant condition protecting a director from liability in the event of a co-director not signing the guarantee and also said that he thought that once the document was made out relating only to a single guarantor, then that part of it which would be operative only should two or more guarantors feature, became irrelevant.

With respect to His Honour, I think that in dealing with the facts His Honour was not applying the principle which emerges from *Hansard v. Lethbridge & Ors.*; that the respondent did not make it a condition of granting credit that all directors give guarantees and that the appellant did not offer his personal guarantee on the express term, that his co-director also gave a guarantee, are not answers to the equitable proposition which is comprehended by the question which, in such a case, one should ask. From the form of the document did the appellant understand that he would be one of two known sureties? I have referred to the evidence and to exhibit 1. In relation to that document, I think it would be unreal to look at the two sides of it isolating one from the other, because the reverse side of it which contains the form of guarantee, had not been completed, other than in the way in which I have described. As a guarantee it is quite meaningless because of its incompleteness and in this respect one need go no further than to point to the fact that no principal debt or account is guaranteed by it. One must look at both sides of exhibit 1 before concluding that the appellant intended to guarantee the credit account of the company named on the front of the document. The statement printed on it indicating to the appellant that the respondent required both his and his co-

director's guarantee, had the corollary that from the form of the document the appellant understood that his guarantee would be supported by that of his co-director.

In our judgment, the following propositions may be culled from the authorities on the point under discussion:

(1) Section 97 of the Contracts Act 1950 embodies the rule invented by the Court of Chancery to relieve sureties from the burden of their liability which, but for the operation of the rule, would be strict at common law.

(2) When interpreting s. 97, guidance may reasonably be sought from cases decided in other jurisdictions which, while recognising the existence of the rule, do not have any provision in their written law that is parallel to s. 97 of our Act or s. 144 of the Indian statute.

(3) The phrase "upon a contract" appearing in s. 97 does not confine the parties to the contract of guarantee itself but includes an arrangement between them, collateral to the main contract, whereby it is contemplated that more than one person should execute the guarantee. In other words, a guarantor who invokes the benefit of the section is not confined to the four corners of the contract of guarantee when seeking to establish the existence of the contract of which the section speaks. He is at liberty to adduce evidence *aliunde* to demonstrate that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor.

The principle that applies here is no different from that obtaining in relation to collateral contracts generally at common law. That principle was stated with eminent clarity by Raja Azlan Shah CJ (Malaya) (as he then was) in *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros.* [1980] 2 MLJ 16. His Lordship, after discussing the leading authorities on the topic, said (at p. 19):

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

See also, *Mok Deng Chee v. Yap See Hoi* [1981] 2 MLJ 321 and *Tan Chong & Sons Motor Company (Sdn.) Berhad v. Alan McKnight* [1983] 1 MLJ 220.

(4) Whether an arrangement as contemplated by s. 97 exists is a question of fact or inference, depending upon the nature and quality of the evidence. If the allegation of an arrangement is based entirely on oral testimony, as it was in *Ayyanna v. Veerabhadram (supra)*, then, it is a pure question of fact based upon credibility for the trial judge to determine. On the other hand, if the evidence includes contemporaneous documents upon which reliance is placed to bring home the point, it is incumbent upon the court to view the evidence, both oral and documentary, as a whole and to draw such inferences as they properly admit. This is what happened in *The City Bank v. Reynolds (supra)*. We are therefore unable to agree with the submission of Encik Naban of counsel for the respondent, based upon the passage in Pollock & Mulla to which we referred earlier in this judgment, that the issue is **always** a pure question of fact.

(5) Where the determination is a matter of inference it is open to an appellate court – indeed it is duty bound – to examine the material on record to see if the trial judge has adopted the correct approach and has drawn the inferences properly admitted by the evidence. And if the appellate court should find the trial judge has fallen into error in drawing the proper inferences, it is entitled to draw its own inferences from the proved or admitted facts and reverse the judge's conclusions. This, we find, is what happened in *Stramit Industries Ltd. v. Reinhardt (supra).*

The present instance is not a case where the issue under consideration is one that turns upon credibility of oral testimony. It is truly a case where the issue that calls for resolution depends upon drawing the proper inferences from the totality of the evidence.

We have earlier in this judgment adverted to the several pieces of oral and documentary evidence in connection with the first issue. Some, if not all, of these are equally relevant to the second issue, in particular, the oral testimony of the respondent's witness (PW3). In our judgment the only reasonable and probable inference that is admitted by the evidence when taken as a whole, including the respondent's letter to the company dated 12 January 1977, is that there was a contract between the parties that Soh shall join in the guarantees. Since he did not do so, the guarantees in the present case are, according to the terms of s. 97, invalid. The judge should have so found. He not so holding.

The Second Issue: Proof Of The Amount Claimed

In the circumstances, we would resolve the second issue in the appellants' favour. Our conclusions upon the first and second issues make it unnecessary for us to deal in any detail with the arguments addressed on the proof by the respondent of the sum claimed by it. That question is entirely academic, as the appellants have been found not to be liable on the guarantees.

Conclusion

To sum-up, the second and third appellants have sufficiently demonstrated that:

(i) Soh was a director of the company at all relevant times and that the trial judge was wrong in holding to the contrary;

(ii) there was in existence at the material time an arrangement between the parties that Soh shall join in the guarantees upon which the instant appellants were sued and that the trial judge ought therefore to have dismissed the respondent's suit.

Accordingly, both these questions must be resolved in their favour.

The Result

For the reasons already given the appeals are allowed. The orders made and judgment entered by the High Court against the second and third appellants are set aside. The respondent's suit against these appellants is dismissed. The costs of this appeal and those incurred in the court below shall be taxed and borne by the respondent. The deposits lodged in court shall be refunded to these appellants.